EXHIBIT 4

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR. 07-0678-JSW
	)	
Glenio Jesua Ferreira Silva,	)	
	)	San Francisco, California
Defendant.	)	Thursday
	)	May 15, 2008
	)	2:58 p.m.

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - U.S. District Court

THE CLERK: Calling Case Number CR. 07-678, United States versus Glenio Ferriera Silva.

Counsel, please step forward and state your appearances.

MS. BARTON: Good afternoon, your Honor. Denise Marie Barton, on behalf of the United States.

THE COURT: How is your rehab coming?

MS. BARTON: Very well, your Honor. Thank you very much.

MR. GRUEL: Good afternoon, your Honor. Steven Gruel, on behalf of Glenio Silva, who is present before the Court, not in custody, and with the assistance of a Portuguese interpreter.

INTERPRETER: Susan Howard, Portuguese interpreter.

THE COURT: And you have been sworn?

INTERPRETER: I have, your Honor.

THE COURT: All right. So we're obviously here based upon the defendant's motion for discovery regarding selective prosecution, and for discovery of the identity of the confidential informant in this case.

So I have carefully reviewed the parties' legal briefs and the authorities that they rely on. And I have a couple of questions I would like to ask. The first question addressed to defense counsel is, because it's not clear from the papers, exactly what is the defendant's theory of selective

prosecution? Is it -- in other words, is it based upon race?

MR. GRUEL: Well, that's an excellent question, your Honor. And I can answer it in multiple parts.

THE COURT: All right.

MR. GRUEL: The first answer is, yes, I think it does involve a race component to it.

And from the limited discovery I've been able to accumulate, mainly from the ICE documents themselves, it seems to me that the only two criminal prosecutions I'm aware of in this District for harboring that are part of the Work Site Enforcement program involve a Brazilian gentleman, to my left, and an Hispanic or Mexican national, Mr. Baez, who -- his matter is pending before Judge Jensen, over in Oakland.

So -- and to add some substance to that claim, your Honor, as I understand it, again, from an ICE press release, as far back as 2005 there was a prosecution -- or I'm sorry -- there was a Work Site Enforcement of a warehouse or of a company at the Oakland port of authority, and for hiring a much larger amount of illegal aliens -- about 63, I think, or 60-some number comes to mind; all Mexican nationals. And, as I read their press release, the only person prosecuted in that case -- it wasn't an employer. It wasn't someone associated with the business, the corporation itself, but one illegal alien who just happened to be someone who was previously deported, and then back in the country, and found in the

northern district of California.

So I have -- from the limited items before me, I have two Work Site Enforcement cases that are criminally prosecuted of a non Caucasian and -- and a corporation who -- I don't know who the owners are of that corporation or who the principals are, I guess, of that corporation; apparently unscathed when it came to the criminal-prosecution aspect of it.

And then I'll just add that I'm not sure what's going to happen. There was a recent ICE takedown about two weeks ago; I think it was of a restaurant chain in the Bay Area. And, as far as I know, there hasn't been any criminal prosecution that has flowed from that.

So the first part of your question is, yes, I think it's race based, but I think the case law --

THE COURT: Is it race, or is it nationality?

MR. GRUEL: Nationality. Nationality. Thank you for that clarification.

THE COURT: All right.

MR. GRUEL: But the next -- I don't think it involves gender. I don't think it involves religion, but I do think that there is a -- in the case law, an understanding that prosecutions cannot be based on any other arbitrary classification. And I look to that as my second part of your -- my answer to your question, your Honor, because what I see thus far is, you know, nothing less than complete

arbitrariness, capriciousness with respect to the decision made to criminally prosecute Mr. Silva for the alleged actions that he is charged with having done.

And again I hearken back, first, with the Court's indulgence, to my own personal experience. I worked at what used to be called "INS." And they used to have a program called "Employment Sanctions." And the goal of that was to take away the magnet of employment. That was 1986, under the Reagan administration.

And what we would do in these type of cases where an employer -- restaurateur hired illegal aliens, what we would do is fine them, because under the work site -- under employment sanctions, and under -- and now Work Site Enforcement, there are two ways you can enforce. One is administratively. Yeah. There's criminally. And back in 1986, '87, '89, we didn't prosecute anyone that I can recall for this type of offense. We went the straight administrative route.

And that's what I now -- fast-forward 20 years -- try to figure out: if that enforcement action administratively still exists. I think it does. I think it's talked about in the work site employment Web sites.

And what other actions have taken place -- administrative actions have taken place in the Bay Area out of this District that -- and what criteria did they use to, on the one hand, go forward and deal with someone administratively,

and then, on the other hand, deal with them criminally?

And certainly the work -- the Web site provided by ICE doesn't give any guidance as to that, because their own language talks about egregiousness. They talk about, you know, alien smuggling. They talk about any type of other criminal activity that warrants a criminal prosecution, as opposed to an administrative action.

And indeed maybe this case started -- it kind of segues into the next argument down the road, the next issue, but this case may have started where it was believed that Mr. Silva was a ringleader of smuggling. It was believed or was told to the case agent that he was someone involved in getting counterfeit documents, driver's licenses, border -- birth certificates, all those things; but that turned out to be untrue.

THE COURT: We're getting beyond the question.

MR. GRUEL: Okay.

THE COURT: What's the Government's response, Ms. Barton?

MS. BARTON: A few points, your Honor. One -- I was troubled when I saw Mr. Gruel's declaration, and I'm still troubled by his representation to this Court of him making himself out as an expert in ICE's procedures, administratively and criminally.

I find it somewhat difficult that counsel who is

representing the defendant is proffering this information based on his personal experience; but moving past that, your Honor, first, I think this assertion that there is a discriminatory intent based on Mr. Silva's nationality is not supported, either in the papers or based on what has just been presented to the Court.

I think, as the case law is clear, the defendant has to show a discriminatory application of law and a discriminatory effect -- I'm sorry -- intent.

And I think what I am gathering is that, based on Mr. Silva's nationality as a Brazilian national, there is an assertion that ICE is going after Brazilians in some respect, and that there has been an intent to go after Brazilians, and that there has been an application of the law to go after Brazilians. And I think the facts that have been proffered do not show that. Even based on Mr. Gruel's own representation as to press releases, there was a Mexican and there was a Brazilian. I think there's a 50:50 chance in the two that he presented. And I don't think there's any evidence; certainly not the showing that needs to be made.

I also think that the case law -- and I'm speaking specifically to the *Turner* Ninth Circuit case on point, and *Armstrong*, the Supreme Court case on point. Frankly, your Honor, these circumstances are similar. Those were both cases where the penalties concerning crack prosecutions were

being challenged, saying that they were going predominantly after minorities and African Americans. And it was largely based on the effect and studies that were showing that blacks -- that African Americans were generally prosecuted.

I think those cases in which the Court held -- the courts held there was not a basis for discovery. Frankly, there was a more evidence per se in those cases than there is here. We just have here two press releases and a Web site as the evidence that the defendant is proffering.

As far as the other assertion, that, I think, is not an equal-protection challenge, which I think is required here under the law -- just that there seems to be a unique circumstance where this case is being prosecuted, when it may not have been in another era, I think --

THE COURT: Well, let me ask you this. If, in fact -- if I accept the representation that this restaurant was raided, and Mexican nationals were arrested, but then not prosecuted, would that be sufficient to meet the burden under *Armstrong*?

MS. BARTON: I do not think so, your Honor.

THE COURT: Why not?

MS. BARTON: I think, your Honor, one instance where somebody was or was not prosecuted doesn't meet the standard which had been represented to be a demanding one. The standard that applies here, your Honor, is that the defendant must

present specific facts; not mere allegations.

And here there needs to be some evidence showing the existence of the essential elements of the defense; one which is discriminatory effect, and the other which is discriminatory intent. And I don't think the raiding of one instance where people may not have been prosecuted makes that showing.

I also note, your Honor, that there are -- well, I'll leave it at that.

THE COURT: All right. Anything further on that?

MR. GRUEL: Yeah. Two points. Very first page of the government's discovery, your Honor, says -- first of all, they call it "Brazilian overstays." It doesn't say, "overstays by illegal aliens." It says "Brazilians."

And it says since late 2006 -- now I'm paraphrasing -- special agents in San Francisco have been investigating Brazilian citizens who have entered the United States and violated the conditions of their nonimmigrant status. So it's clear that --

THE COURT: What's wrong with that? Why does that show arbitrary --

MR. GRUEL: I think she made the reference that this just happened. There's no intent or no -- no intention that this was going -- on Brazilians per se. That's how I read it. I mean, it does seem to include that phrase.

THE COURT: All right. What's your answer to that?

MS. BARTON: This case did involve Brazilians. We couldn't call them Mexicans because they weren't. I think it would have been the same if there had been Algerians. It would have used that to describe them. That does not show intent with discriminatory nature.

MR. GRUEL: The final point, your Honor.

THE COURT: Yes.

MR. GRUEL: I think what I would say to the Court and to counsel about whether or not there's been a showing, you know, when you have these type of case, you know full well. You understand that there's a high hurdle that has to be overcome, but you have to start somewhere. I mean, I can't begin to -- if this is one of three cases, what do I have to look back to to make that showing, other than what has happened previously that's not in a criminal court, but is in an INS court, or being dealt with administratively? I don't know if those are public records or no not. I don't think they are.

And so how can I make a showing on something that -- how do I prove a positive, when I don't know what exists in that universe? It has to start somewhere. And this is, I think, that first step.

THE COURT: All right. I'll give you the last word if you wish, Ms. Barton.

MS. BARTON: Your Honor, I think the papers are clear that the fact that the defendant needs discovery in this

case -- directly on point to what Mr. Gruel just addressed, the fact that he does need discovery to prove his point is not a basis to obtain the discovery that he's seeking.

THE COURT: All right. Well, the parties -- I won't restate the facts that the parties rely on, because I think the papers adequately describe the facts. And, as the parties alluded to, in order to obtain discovery that defendant seeks that relates to selective prosecution, the defendant must provide, quote, "some evidence tending to show the existence of the essential elements of the claim"; namely, discriminatory effect and discriminatory intent. And that's the *Armstrong* case. That's the citation of -- which is in the parties' papers.

And in *Armstrong*, the Supreme Court held that with respect to the discriminatory-effect element in a case of selective prosecution based upon race, this requires a defendant to put forth some evidence that, quote, "similarly situated defendants of other races could have been prosecuted but were not." End quote. And that's at 469 of that case.

The Court also noted, however, that, quote, "The justifications for a rigorous standard for the elements of a selective prosecution claim require a correspondingly rigorous standard for discovery in aid of such a claim." End quote. And that's *Armstrong* at page 468.

In the *Turner* case, which the parties referred to in

their papers -- the citation is in their papers -- the Ninth Circuit noted that, quote, "The threshold requirement to obtain discovery on the weight of providing a selective prosecution defense," quote, "must relate to the defense to be proved."

Now, the defendant clarifies today that his theory in response to the Court's question is -- his theory of selective prosecution is based upon a -- is based upon discrimination based upon nationality. The Court finds that the defendant does not meet his burden to establish a right to discovery. And the reasoning is as follows.

In the *Armstrong* case, the defendant relied on an affidavit that stated that, quote, "In every one of the 24 U.S.C. Section 841 or 846 cases closed" -- end quote -- by the prosecutor's office, the defendant was black.

The defendant also submitted what was characterized as a study with the affidavit. That listed the 24 defendants and their race. The Supreme Court concluded that this study, quote, "did not constitute some evidence tending to show the existence of the essential elements of a selective prosecution claim." And that's at page 470.

Specifically, the Court found that, quote, "The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." End quote.

Similarly, in the *Turner* case, the defendants also

relied on statistical evidence to support a race-based prosecution claim. And the Court found it insufficient to establish a right to discovery. And that's *Turner* at pages 1,184 through -85.

In this case, the defendant attests that the United States Attorney's Office has chosen to prosecute only three Work Site Enforcement cases. And notwithstanding that, and notwithstanding the offers that are made today by Counsel, the defendant has not put forth any evidence regarding those cases it has -- that the Government has chosen not to prosecute.

Instead, the defendant appears to rely on the description of the Work Site Enforcementment program, and contends that this case and the other cases that have been prosecuted do not fall within its parameters. Thus, even if the defendant's theory is that the Government is acting in an arbitrary fashion with respect to the prosecution of these types of cases, the Court -- the record still fails to show evidence showing the manner in which the Government acted arbitrarily.

And finally, if the evidence in the *Armstrong* case was not sufficient to entitle the defendant to discovery, the Court cannot conclude that the evidence that this defendant offers in this case would be sufficient. Therefore, the Court finds that the defendant has not presented sufficient evidence

to meet the standard required in *Armstrong*, and the motion for discovery is denied.

Now I want to move on to the motion for discovery of the identity of the informant. And I have a question for the Government, which is the following. How does the Government respond to Mr. Gruel's declaration, in which he attests that the informant identified as SA-1180-SF provided ICE with defendant's books and other information about the defendant? And that's in Mr. Gruel's declaration at paragraphs five through six.

MS. BARTON: I think that statement is true, is my first response. And I think that statement was derived from the discovery that was produced to Mr. Gruel in the course of discovery.

I think, however, it still does not change the notion that this identity should not be disclosed.

THE COURT: I'm not asking for that argument yet.

MS. BARTON: The reason why, your Honor, is that I think whether somebody is providing oral information or providing written documentation, it is the same as if this person was a tipster. They were not directly involved in the conduct that was charged. They were just providing information that allowed ICE to continue with an investigation.

I know Mr. Gruel in that point in his papers claimed that because the books were provided by somebody, there would

be a chain-of-custody issue.

Well, I think all the people in this courtroom know that chain of custody goes to the weight, not the admissibility of the evidence. So, should that become an issue at trial, it can be something that is raised with respect to the significance and the weight of the evidence; but I think the information and the fact that somebody was the water boy, essentially, from one person to another does not make that person relevant or essential to the defendant's case.

THE COURT: Well, Mr. Gruel, let me ask you to respond and expand your answer to include this question. On what basis does the defendant contend that the informant would be relevant and helpful to his defense?

MR. GRUEL: Um.

THE COURT: Because that's the standard.

MR. GRUEL: Okay. Yes. And I think in my reply to the Government, your Honor, I think I address that, and mainly as impeachment evidence, as I think -- as I understand -- I'm going to go out on a limb here. I understand that a water boy, as the Government referred to, may be a Government witness in trial. It may be one of the people who was allegedly harbored, or may be the identified informant, Silvano Santos.

So my guess -- my argument, your Honor -- and I can be disavowed of this, but I think the water boy came forward, told much more about Mr. Silvano, much of which was untrue, as

we've learned, and probably gave him that book or books of ledgers or what have you, and had that passed on to the case agent.

THE COURT: But are you contending -- I don't think there's anything in the record from which this Court can conclude that this confidential informant participated in the crime or may be the sole witness to the crime.

MR. GRUEL: That's the Government's representation. I don't have anything to disagree with that.

THE COURT: But isn't that your burden? Don't you have to show that?

MR. GRUEL: No, I don't think so, your Honor. I mean, if I note for -- if I -- if I -- I mean, again, the Government has to make a choice, many times, with respect to informants. Either they don't reveal them, and they -- and they deal with any possibility of exclusion of evidence, or they do reveal them, and they don't have to worry about the exclusion.

There's no issue here about the safety of this individual, in my opinion, your Honor. And what the facts show, as I understand them, is that he was an individual conveying documentary evidence, and also conveying a message about what -- who and what Mr. Silvano was up to.

Now, if the Government counsel could tell me that that has nothing to do with one of its anticipated witnesses,

then, case closed. I guess then you're right. And there's nothing I can do about it. And they can go ahead and keep their informant from being disclosed.

But if one of the witnesses they're going to call at trial was an individual who told this information to SA-1180-SF, and it turns out to be completely false, I should have the ability to call that person -- that undisclosed informant -- to the stand, and impeach that potential witness, because someone's lying, is what it boils down to.

Either the --

THE COURT: There's no doubt that if the scenario you mentioned is true, that this -- the identity would be helpful, but that would not necessarily make this person that you're hypothesizing a participant in the crime or the sole witness to this crime, right?

MR. GRUEL: I don't believe the person was a participant. Well, I don't know. I assume not.

THE COURT: But accepting your hypothetical or inference -- I won't call it "speculation."

MR. GRUEL: Yes.

THE COURT: -- it doesn't sound like it amounts to an argument that this was a percipient witness or, much less, that this was a participant or a sole witness to this crime, correct?

MR. GRUEL: Correct.

THE COURT: What's your response?

MS. BARTON: My response, your Honor, is I think that the Government has made it clear, as was just indicated, that this was not a percipient witness. This witness does not have direct information. And I think impeachment purposes alone is not something that would be relevant and necessary to the impeachment -- I mean -- wait a minute. Let me back up for a second.

Impeachment as to another potential Government witness is not something that would meet the standard, as is required under the case law.

And I know your Honor --

THE COURT: If it did, wouldn't it come under *Brady*, as exculpatory evidence?

MS. BARTON: I think -- well, certainly if there is any exculpatory information, it would be disclosed. And we would have that obligation and meet that obligation. Frankly, knowing the facts as I do, I can't conceive of any circumstance under which the identity of that person would be *Brady* material as to any of the currently intended Government witnesses.

I think, your Honor, this circumstance that Mr. Gruel is arguing has been squarely addressed. I believe it's -- I believe it's the *Henderson* case, where there was a witness -- there was -- yeah, it was the *Henderson* case. *U.S. v. Henderson*, 241 F. 3d., 638. And it speaks specifically to --

your Honor, the defendant in that case came to the attention of the law-enforcement authorities after his picture had been broadcast in connection with an *America's Most Wanted* program. And somebody called in; gave a tip; gave information that led the FBI to this person. He was subsequently prosecuted in connection with several bank robberies. That information -- that person provided information that assisted in a prosecution.

The defendant in that case wanted information as to the informant to see if there was some nefarious purpose that the person had provided information that could assist him. And the Court squarely held, your Honor -- this was the Ninth Circuit in 2001 -- held that regardless of the evil motives of this informant, it would not have explained away the most convincing evidence of the defendant's guilt.

And I think in this case what the evidence that had been provided in discovery -- it has not been a small amount. And the evidence that will be presented at trial would show, by means of statements, by means of witnesses, by means of documents, that Mr. Silva was employing people and allowing them to live at his property, when he knew that they were illegal.

The fact that somebody may have provided books to somebody and there may have been some odd relationship doesn't bear on the essential elements of this case.

THE COURT: All right.

MR. GRUEL: Well, I think the case she just cited is extremely factually much, much different and distinguishable from the facts here. We don't have some sort of tipster or somebody just calls in and reports something. And this is obviously much different, where somebody came in over time and sat down and actually brought evidence to the agent.

The bottom line, I think, your Honor, is this. And I have no faith that -- frankly, that I'm getting all my *Brady* material, but I think frankly that what you're going to have in this particular case are going to be witnesses, because we've seen it.

THE COURT: Wait. I'm not going to let that go unchallenged. If you feel that's true, then you need to make your record at the appropriate time.

MR. GRUEL: I'll state it now, if I may, your Honor. I have found out that there have been -- witnesses testified in these material-witness depositions we've had thus far. They have been all over the board in saying what either Mr. Silva knew or didn't know. And I know for a fact that probably the main informant that they've disclosed in this case is Silvano Santos, who has a huge axe to grind against Mr. Silva.

And that action includes going to the Labor Department and trying to get back wages against him to the tune of about 170-some-thousand dollars.

Well, we went to a hearing before the State of California, and we won. They found that he was an employer; not Mr. Silva. That's something that may or may not work itself into the criminal trial in this case.

I believe that Mr. Santos -- Mr. Santos, the informant that has come forward with ulterior motives, is coming forward; is --

THE COURT: Wait a minute. Didn't you suggest that in the motion? The Government swore that it was not or asserted that it was not him. And I understand that, from your papers, you have accepted that representation.

MR. GRUEL: Maybe I'm being confusing. No. There are at least two informants in this case. One of them is the undisclosed individual we're talking about. The other individual is Mr. Santos.

Mr. Santos has filed two lawsuits against Mr. Silva and, frankly, is one of the most important witnesses for the Government in its case. His two lawsuits dealt with a claim that he was battered by this individual, which was not accepted by the District Attorney. There was no prosecution; but when he appeared at small-claims court down the street to deal with that lawsuit, he appeared with someone who I believe to be an informant for the Government. And, quite frankly, it might even be SA-1180-SF.

I think that when the jury gets this case, with all

the different stories we've been hearing, with all the ulterior motives that Mr. Santos may have to get Mr. Silva, that it may include telling a story either, you know, knowingly, or telling a story about who he is and what he was involved in to entice ICE to take a look at him.

THE COURT: But aren't we going for -- I mean, you did respond to the Court's question about the alleged compliance with *Brady* obligations, but what does that have to to do with this motion to disclose the informant?

MR. GRUEL: How else can I prove that Mr. Santos, the known informant, may be involved in telling stories and lies and providing impeachment material to an individual who may have gone into ICE and provided the book, told stories about -- you know, about what Mr. Santos was or was not involved in?

And keep in mind, if I may, your Honor, what -- Mr. Santos used to work at Monterey Pizza. He left in December of 2006. He took with him a book that dealt with the employment situation at Monterey Pizza. That book, I believe, is the same one that was then provided to the unknown informant who walks over to ICE.

Maybe -- maybe I'm not being clear. And I apologize.

THE COURT: I understand your point.

What's your response, Ms. Barton?

MS. BARTON: A few, your Honor.

First of all, I am highly offended by the

scorched-earth policy in the assertion that I am not providing *Brady* material.

THE COURT: First of all, I don't want to hear that kind of response. I asked a question that --

The allegation was made. You know, we'll deal with the allegation at the appropriate time. I don't think it's necessary or appropriate to be personally offended or professionally offended, because I have nothing before me. And if there -- if there's a perceived *Brady* issue, then it will come up at the appropriate time. This is not the time.

MS. BARTON: If I may respond to the specific *Brady* violations that Mr. Gruel did raise to the Court just now --

THE COURT: Right.

MS. BARTON: One: the book. It has been disclosed. So this mysterious book that had been issued has been produced in discovery. Mr. Gruel has had it since the inception of this case after his client was charged.

Two: the labor disputes that Mr. Santos had been involved in -- that is not something that is in my custody, care, or control. I have no obligation to go out to the Labor Board and seek out law enforcement or seek out other civil and administrative lawsuits.

In fact, I have no doubt that Mr. Gruel has those documents in his possession and has been using them, because I know that he has been pressing --

THE COURT: We're getting far afield. And you don't need to respond because, again, *Brady* is only relevant if there's some showing of prejudice. And if that is when it happens, I will deal with it; but I want -- you know, I allowed this argument to get a little bit far afield, so -- but do you have anything more to say on the motion?

MS. BARTON: On the motion, your Honor? No. I think, frankly, the upshot of it -- and I think it's clear in my papers -- is that the defendant has not made a showing. He indicated in response to the Court's question that he didn't think he did have the burden.

Well, the case law is square. He does have the burden to show that. And it's a minimal threshold. I know that, but he does have a minimal-threshold showing. And he must do more than make conclusory statements that information could be helpful or is based on mere suspicion. The *Damico* case, 466 F. 3d. 996, and several other cases that were cited in the Government's papers -- I think, frankly, what's here is just conclusory allegations and just suspicion on behalf of the defendant.

I think this defendant has not shown that it would be relevant and helpful or essential -- either one would qualify -- and that it certainly doesn't override the interests of the Government in protecting access to information.

THE COURT: All right. Anything further?

MR. GRUEL: I guess, your Honor, the only thing I would add to that is if this matter goes to trial and witnesses are asked whether they provided information to someone who then walked in to ICE, and the answer I get is -- I'm trying to speculate -- is something that is favorable to the defense in some fashion, I don't know what -- what reversible error that might create. I don't know what requests it might create for me to ask for some sort of extension of time.

THE COURT: Well, I would suggest the following. Let's deal with this motion. And we certainly will have enough time and process to deal with any with perceived withholding of evidence to go forward, because I don't want a mistrial. I certainly don't want to commit reversible error; but that's not really before me now.

The matter as to the motion for disclosure of the confidential informant is submitted.

And the legal standards which apply here is that the Government has a limited privilege to withhold an informant's identity under *U.S. versus Spires*, which cites *Roviaro*. All these cases are -- unless I mention otherwise, are contained in the Government -- in the Government and the defendant's papers.

When determining whether to grant a motion to disclose the identity of an informant, the Court must balance, quote,

One, the extent to which disclosure

would be relevant and helpful to the defendant's case; and, two, the Government's interest in protecting the identity of a particular informant. In making this determination, the Court must consider the public interest in protecting the flow of information against the individual's right to prepare his defense. End quote. And that's also under *Spires*.

"The burden of proof" -- quoting now -- "is on the defendant -- defendants to show need for disclosure." End quote.

And I'm citing *United States versus Sai Keung* -- K-e-u-n-g -- *Wong*, 886 Fed. 2d. 252 et. 256, Ninth Circuit, 1989 case.

Moreover, quote, "A mere suspicion that the information will prove helpful will not suffice to demonstrate a need for disclosure."

And that's *United States versus Roland*, cited by the Ninth Circuit in 2006, citing other cases.

The Ninth Circuit has held that a district court abuses its discretion if it does not hold an *in camera* hearing on disclosure where the defendant makes a, quote, "minimum threshold showing" -- end quote -- that disclosure of the defendant's identity would be relevant and helpful to a

possible defense at trial. Citing *Spires* at pages 1,238 to -39.

However, the Ninth Circuit has also held, in the *Henderson* case that counsel has alluded to here, that an *in camera* hearing is not necessary where the potential defense fails to explain all of the evidence against the defendant.

Disclosure of an informant's identity may be necessary when the informant participated in or instigated the charged crime. I mean, that's *Roviaro* at page 65.

Similarly, disclosure may be necessary where probable cause for search was based solely on the information provided by the informant, and the constitutionality of the search is at issue.

And most of the cases, according to *Roviaro* -- cited in *Roviaro* -- *Roviaro* explained that most of the cases where the Court finds it necessary to disclose an informant's identity have arisen where the legality of a search without a warrant is an issue, and the communications of an informer are claimed to establish probable cause.

In contrast to the *Roviaro* case and the authorities cited, disclosure of an informant's identity generally is not necessary; not necessary where the informant did not participate in the crime, is not the sole witness to the crime, and probable cause is not an issue.

That's under *Roland* and *Williams*.

In *Roland*, an informant notified drug enforcement agents of a plan to smuggle methamphetamine from Hawaii to Guam. The Court held that disclosure of the informant's identity was not necessary, because the informant did not participate in the crime. The truth of the informant's testimony was not specifically challenged. And mere suspicion that identification of the informant might help the defense is not sufficient, quote, "to go on a fishing expedition into the informant's background." And that is *Roland* at page 909.

And the facts in *Williams* are similar. In *Williams*, the Court held that disclosure of an informant's identity was not necessary where the informant did not participate in the crime, and the only reason for disclosure was the speculative assertion that the informant would be useful to impeach other testimony. And that is one of the arguments being made here today.

The defendant, Mr. -- defendant's counsel attests in his declaration that the informant provided ICE agents with defendant's accounting books and updated personal information about the defendant. And that's Mr. Gruel's declaration at paragraph six. Thus, the defendant contends that the informant is more than a tipster, and actually is a percipient witness.

However, defendant's files suggest that the informant was a participant or the sole witness to the crimes with which defendant is charged. Nor does the defendant articulate how

the informant would be relevant or helpful to his defense at trial, other than by statements which amount to mere speculation.

Although Agent Purfeerst -- P-u-r-f-e-e-r-s-t -- attests that the informant has not met defendant and has no direct dealings with defendant, Agent Purfeerst does not refute Mr. Gruel's statement that the informant provided the Government with defendant's books. And the Government again concedes that today; but even if this is true, it does not necessarily suggest that the informant was a participant in the crime, rather than a mere tipster.

So I conclude that the defendant has failed to carry his burden, either to entitle him to an *in camera* hearing or to know the identity of the informant. And so -- or to disclose the identity of the informant. Therefore, the motion for disclosure of the identity of the informant is denied. And the Court believes that it's not appropriate to have an *in camera* hearing.

So, with those motions being resolved, are we ready to set a trial date?

MR. GRUEL: Well, if you recall, your Honor, the last time we were before the Court I raised two points. One is I wanted to have two waves of motions. First, we just dealt with the first wave.

THE COURT: Right.

MR. GRUEL: The second wave is I do want to bring to the Court several substantive motions.

And I would also remind the Court that when I last was here, I mentioned to the Court that I have a trial before Judge Weir starting August 19th.

THE COURT: I recall that. Yes, I recall that.

MR. GRUEL: The good news is one of the -- there are several defendants in the case. One of them has pled, too, so it's going to be a shorter trial; but unfortunately, he's also coöperating against my client. So it's going to be a much more difficult task. So with your permission -- what I was wondering, your Honor, is whether I would have -- could have the necessary time to prepare this second wave of motions, which I think are going to deal with a motion to suppress. It's a statement by Mr. Silva, a motion to dismiss the case -- the indictment for selective prosecution.

And I had one -- I think I had one more substantive motion, but it just escapes me right now. It was going to be more than just one motion. And I -- I would like as much time as possible, with the understanding that I am preparing for a trial before Judge Weir, but I also know the Court likes to move its calendar, so I'm somewhat at your Honor's mercy.

THE COURT: Well, give me a proposal and --

MR. GRUEL: Okay.

THE COURT: -- I'll ask the Government's response,

and then we'll see how a reasonable I can be.

MR. GRUEL: Well, latter part of the first week of June I have to -- my mother has a medical issue that requires me to go back, so I'm not going to be around at all for that whole week. I would ask for, your Honor, June -- June 30th to file these motions. I don't know if that's --

THE COURT: Well, let me ask what the Government's position is.

MS. BARTON: As far as the timing, actually, I don't have a problem with the timing suggested by Mr. Gruel, you know. I'm actually out of the district for a work-related conference the first week in June. And I'm on trial the third week in June. So his timing -- I think if it works with his schedule --

THE COURT: Sounds like --

MS. BARTON: One thing we might agree on today.

THE COURT: All right. So let's say all additional motions -- and these will be the final. This is the final wave?

MR. GRUEL: I believe so.

THE COURT: All right. The final wave of motions by the 30th of June to be filed. And how much time to respond?

MS. BARTON: Your Honor, I typically would ask for two weeks, but depending on the nature of the motions, I may need more time than that.

THE COURT: Well, I'll give you three weeks, since we're giving a substantial amount of time.

MS. BARTON: I would appreciate that.

THE COURT: Also, it works to Mr. Gruel's benefit. So three weeks hence, Ms. Ottolini.

THE CLERK: Would be July 21st.

THE COURT: And a week later for your reply.

MR. GRUEL: Formidable arguments from Ms. Barton always, your Honor. So I would prefer to have two weeks, if I may.

THE COURT: Two weeks for reply?

THE CLERK: August 4th.

THE COURT: And then hearing, I would say, two weeks later.

THE CLERK: Excuse me. August 21st at 2:30 p.m.

THE COURT: When is your actual trial?

MR. GRUEL: Starts the 19th. And it's going to be about a month. And that's the Government's projection. I'm trying to recall whether Judge Weir only goes in the morning. I've had a trial before, and he went from --

THE COURT: Let's do this. Let's set it. And then the easiest thing to move is the hearing date. So let's set it for two weeks thereafter. And we'll see if we can work with -- Judge Weir is very good, as all the members of the Court are, in accommodating each other's schedule. So especially if it's

going to be a long trial, I'm sure he'll accommodate it.

If not, we can move it. We'll get everybody together and talk about it. So, Ms. Ottolini, two weeks after the last brief for the last hearing?

THE CLERK: August 21st, 2:30 p.m.

THE COURT: We can always move that.

MR. GRUEL: I vaguely recall that we might be before the judge even before that date, your Honor. I can raise that with him, and see if he'll let me come up here that afternoon.

THE COURT: All right. If it's a problem, let us know. Maybe you can work out a stipulation with the Government counsel.

THE CLERK: I just -- time is excluded between now and June, the filing of the next wave of motions?

THE COURT: Would you agree with that?

MR. GRUEL: I agree with that, your Honor. The case remains complex. And for effective preparation by counsel for these upcoming motions, I stipulate that there's excludable time under the Speedy Trial Act.

And I would add one other thing, your Honor. As the Court recalls, you asked whether this was going to be -- if this was the end of motions; if that's the second wave. I don't know if we would call them motions or not, but we've had three material-witness depositions. And the understanding had been to make those matters go quickly and effortlessly,

everyone, in essence, has reserved their objections. So should the matter go to trial, we'll probably be coming before the trial with those depositions.

THE COURT: I would imagine that would happen in the pretrial -- I allow for that in the pretrial. The only observation I would make about one of the things you said, Mr. Gruel, which was the motion with respect to dismiss based upon selective prosecution. I know that you need to file a motion. I know that you may need to file the motion to protect the record, but I want you to be mindful of the standards that the Court has set forth in connection with the motion, and even though you may disagree --

MR. GRUEL: I understand.

THE COURT: -- I think certainly you can make your point for appeal purposes if you need to, but I want you to be mindful of at least the Court's view of the law in this area.

MR. GRUEL: I would not waste your Honor's time or the Government's time with a frivolous motion, your Honor; but you hit it on the head. And that is I've got to protect the record. And I don't think having discovery denied on that type of motion necessarily protects it substantively.

THE COURT: No. I understand that, but it goes to how -- the way it's presented and how it's prosecuted -- the motion, that is.

Yes, Ms. Barton. You look --

MS. BARTON: No, no, no. I have no questions.

THE COURT: Okay. Anything further?

MR. GRUEL: No.

MS. BARTON: No, your Honor. I'll prepare an order in accordance with the Court's statement and stipulation.

THE COURT: All right. Thank you.

THE COURT: On what?

MS. BARTON: Time exclusion.

THE COURT: Thank you very much. Thank you, sir.

(At 3:42 p.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in CR 07-0678-JSW, United States of America v. Glenio Jesua Ferreira, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Lydia Zinn, CSR 9223, RPR

Thursday, June 19, 2008